

March 13, 2007

Mr. Robert P. Reeder
Director, Common Cause of Delaware
1302 Barksdale Road
Newark, DE 19711

Mr. Syl Woolford
71 New London Road
Newark, DE 19711

**RE: Freedom of Information Act Complaint
Against Delaware State University**

Dear Mr. Reeder and Mr. Woolford:

On January 18 and 23, 2007, our Office received your complaints alleging that the Delaware State University Board of Trustees ("the Board of Trustees" or "the Board") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by meeting on January 10, 2007 without notice to the public.

By letter dated January 23, 2007, our Office asked the Board of Trustees to respond to your FOIA complaints in writing by February 5, 2007. We granted the Board's request for a two-week extension of time to respond, and received the Board's response by facsimile on February 19, 2007. On February 20 and 21, 2007 our Office asked the Board of Trustees for additional information which we received on February 23, 2007.

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 2

In its response to your FOIA complaint, the Board of Trustees provided us with the By-Laws of the Board of Trustees (adopted 8/28/03, revised 11/11/03). Section III.D of those By-Laws provides: "Six members of the Board of Trustees shall constitute a quorum."

The Board also provided us with a sworn affidavit from Dr. Allen Sessoms, the President of Delaware State University, which states: "On January 10, 2007, Marvin Lawrence, Richelle Vible, Charles McDowell, John Land, Wesley Perkins, Rick Barros, Jose Escheverri, Donald Henry and Caroline Curry accompanied me for dinner at the University and Whist club in Wilmington, Delaware. At no point were more than seven members of the Board of Trustees of Delaware State University present at the dinner." ¹

According to the Board of Trustees, there are fifteen members of the Board and eight members constitute a quorum. The Board contends that the open meeting requirements of FOIA did not apply to the January 10, 2007 dinner because only seven members of the Board attended and therefore "there was not a quorum of Board members present at the subject dinner."

RELEVANT STATUTES

¹ Dr. Sessoms' affidavit lists ten persons (including himself) who attended the dinner on January 10, 2007. According to the Board of Trustees, Donald L. Henry, and Caroline S. Curry are not members of the Board; Mr. Henry is the University's Vice President for Business and Finance and Ms. Curry is the University's Vice President for University Relations. Dr. Sessoms is an *ex officio* member of the Board but by statute *ex officio* members are not counted towards a quorum. See Note 2 *infra*.

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 3

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed " for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purposes of discussing or taking action on public business." *Id.* §10002(b).

FOIA provides that a "'meeting' . . . shall not include activities of . . . Delaware State University, except that . . . each meeting of the full Board of Trustees [of Delaware State University] shall be a 'meeting.'" *Id.* 10002(d).

LEGAL ANALYSIS

The threshold legal issue for our determination is whether a quorum of the Board of Trustees gathered on January 10, 2007 so as to trigger the open meeting requirements of FOIA.

"The term 'quorum' is not defined in [FOIA] and reference must be made to the statutory or other regulations governing the agency in question." *Delaware Solid Waste Authority v. The News-Journal Co.*, 480 A.2d 628, 634 (Del. 1984) (the Authority's enabling statute, 7 *Del. C.* §6403(c), provides that "'[f]or purposes of conducting business of the Authority, 5 directors shall constitute a quorum.'").

The Board's By-Laws in effect on January 10, 2007 provided that "Six members of the Board of Trustees shall constitute a quorum." That provision was consistent with Delaware State

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 4

University's enabling statute which, prior to 2005, provided that the "Board of Trustees of the University shall consist of 11 members whose appointment or election is provided for in subsections (b) and (c) hereof and the Governor of the State and the President of the University, both of whom shall be members, ex officio." 14 *Del. C.* §6504(a). "Six of the trustees shall be appointed and commissioned by the Governor" and "[f]ive of the trustees shall be elected by a majority of the whole Board as constituted." *Id.* §6504(b), (c).

Section 6505 of the University's enabling statute provides: "A majority of all those members appointed by the Governor and those members elected by the Board shall constitute a quorum." 14 *Del. C.* §6505. Prior to 2005, the Board of Trustees had eleven appointed and elected members and by statute a majority of those members (six) constituted a quorum. The statute does not include, for purposes of counting a quorum, the Board's two *ex officio* members (the Governor and the University President). ²

² A person is an *ex officio* member "by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office." *Black's Law Dictionary* 661 (rev. 4th ed. 1968). At common law, "'ex officio members of a public body are members for all purposes and must be counted in determining the presence of a quorum.'" *Barber Pure Milk Co. of Montgomery v. Alabama State Milk Control Board*, 156 So.2d 351, 357 (Ala. 1963) (quoting *Louisville & Jefferson County Planning & Zoning Commission v. Ogden*, 210 S.W.2d 771, 774 (Ky. App. 1948)). By statute, the Governor and the President of Delaware State University are *ex officio* members of the Board of Trustees. Section III.E. of the Board's by-laws provide that *ex officio* members "shall be entitled to vote at all meetings." By statute, however, the Governor and the President are not counted for quorum purposes. The statute only counts for quorum purposes "those members appointed by the Governor and those members elected by the Board," 14 *Del. C.* §6505, but does not count *ex officio* members like the Governor and the University President towards a quorum. It should be noted that if *ex officio* members could be counted towards a quorum, a quorum of the full Board of Trustees would be nine members.

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 5

On June 30, 2005, the General Assembly amended Section 6504 to increase the appointed and elected members of the Board of Trustees from eleven to fifteen (eight appointed by the Governor, and seven elected by the whole Board). *See 75 Del. Laws c.82*. The General Assembly, however, did not change Section 6505 so that a quorum is still a majority of the members appointed by the Governor or elected by the whole board (excluding *ex officio* members). When the General Assembly increased the number of appointed and elected members of the Board of Trustees, by operation of law a quorum of the Board increased from six to eight, notwithstanding any contrary provision in the Board's by-laws providing for a quorum of six.³

"Absent specific statutory requirements, Delaware corporations, through provisions in their certificates of incorporation or bylaws, are able to establish their standards for determining a quorum and the required vote for approval of any matter." *Licht v. Storage Technology Corp.*, C.A. No. 524-N, 2005 WL 1252355, at p.3 (Del. Ch., May 13, 2005) (Noble, V.C.). Delaware corporations – like Delaware State University – are creatures of statute. "Provisions governing corporate operations include not only a corporation's articles of incorporation and bylaws, but also relevant sections of the statutory scheme under which the corporation exists." *Baldwin*

³ According to the Board of Trustees, there are currently two vacant positions on the Board. We agree with the Board of Trustees that, for purposes of counting a quorum, the baseline is the number of appointed and elected members authorized by law, not the number of actual sitting members. *See Opinion of the Justices*, 251 A.2d 827 (Del. 1969) ("a quorum necessary to be present in order for a House of the General Assembly to act in a valid and effective manner is a majority of the number of members of that House prescribed by law, irrespective of whether or not one or more vacancies have occurred by reason of death, resignation, or otherwise.").

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 6

County Electric Membership Corp. v. Lee, 804 So.2d 1087, 1090 (Ala. 2001) (citing 1 C. Keating & G. O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations*, §365 at p.226 (1990)).

"Thus, where articles of incorporation or the bylaws conflict with the statute, the statute controls."

Baldwin, 804 So.2d at 1090.

In *Baldwin*, ten percent of a corporation's members made a demand for a special meeting as provided in the by-laws. They did not comply with a state statute requiring the demand to be dated to determine "the benchmark on which to identify those shareholders entitled to *demand* the special meeting in the first place." 804 So.2d at 1091. The Alabama Supreme Court held that the special meeting was invalid. "The bylaws, which do not require that a written demand for a special meeting be dated, conflict with [the state statute], which does so require. [Baldwin] is correct, therefore, in its contention that [the state statute] controls." *Id.*

In *Louisville & Jefferson County Planning & Zoning Commission, supra*, the Commission consisted of ten members. The Commission by-laws provided that a quorum shall consist of five members. That by-law conflicted with a state statute defining a quorum as "a majority of such officers or other persons." 210 S.W.2d at 774 (quoting Ky.Rev.Stat. §446.050). The Court of Appeals of Kentucky held that the statute superseded the Commission's by-law and the Commission could only take valid action when six members (a majority) were present. "Even a private banking corporation may not adopt a by-law that is inconsistent with a statute." *Id.* at 774.

In 2005, the General Assembly amended Section 6504 of Delaware State University's enabling statute to increase the number of appointed and elected members of the Board of Trustees

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 9

from eleven to fifteen. The General Assembly did not amend Section 6505 which provides that a quorum of the Board is a majority of its appointed and elected members. By operation of law, when the legislature increased the number of appointed and elected Trustees, it also increased the number for a quorum: from six (a majority of eleven appointed and elected members) to eight (a majority of fifteen appointed and elected members). Therefore, even though the Board's by-laws still provided that a quorum is six members, the specific statutory requirement for a quorum of the Board controls as a matter of law.

We determine that the open meeting requirements of FOIA did not apply to the gathering of seven appointed and elected members of the Board of Trustees at a private club on January 10, 2007 because at the time a quorum of the appointed and elected members of the Board (eight members) was not present.⁴ Consequently, it is legally irrelevant whether the dinner was a purely social occasion or whether the Board discussed matters of public business as defined by FOIA.

CONCLUSION

For the foregoing reasons, we determine that the Board of Trustees did not violate the open

⁴ In several opinions our Office determined that a public body might achieve a "constructive quorum" through serial meetings of less-than-a-quorum of the public body. *See, e.g., Att'y Gen. Op. 03-IB11* (May 19, 2003); *Att'y Gen. Op. 04-IB10* (Oct. 18, 2004); *Att'y Gen. Op. 05-IB03* (Feb. 3, 2005); *Att'y Gen. Op. 06-ID20* (Sept. 11, 2006). "All of our previous opinions which found serial discussions to have violated FOIA had one factor in common. In each case the discussions involved enough members of the public body that would have constituted a quorum had the discussions all occurred at the same time and place." *Att'y Gen. Op. 06-ID18* (Sept. 5, 2006). *See Att'y Gen. Op. 06-IB03* (Jan. 23, 2006). In this case, there was only one gathering of less-than-a-quorum of the Board of Trustees so the "constructive quorum" analysis does not apply. *See Att'y Gen. Op. 06-IB03* ("there is no evidence in the record that the Town Council met in a series of subquorum groups to avoid the application of Delaware's FOIA").

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 9

meeting requirements of FOIA when seven appointed and elected members of the Board (less than a quorum) gathered for dinner at a private club on January 10, 2007.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Lawrence W. Lewis, Esquire
State Solicitor

Mr. Robert P. Reeder
Mr. Syl Woolford
March 13, 2007
Page 9

cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

Marc S. Casarino, Esquire

Phillip G. Johnson
Opinion Coordinator9